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In the Supreme Court of the United States

OCTOBER TERM, 1959

THE DEUTSCH COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B, 11-26) is reported at 265 F. 2d 473. The decision of the National Labor Relations Board (R. 29-85)[1] is reported at 118 NLRB 1294.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1959, and a petition for rehearing was denied on November 2, 1959. The petition for a writ

[1] The reference "R" is to the printed transcript of record filed with the court below.

of certiorari was filed on December 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly denied a motion to set aside a Board order directing petitioner to bargain with the certified union, on the ground that the union allegedly had ceased to exist.

2. Whether, in the circumstances of this case, the Board properly refused to permit petitioner to relitigate in the unfair labor practice proceedings the Board's determination in the antecedent representation proceedings that petitioner's two plants constituted a single appropriate unit for purposes of collective bargaining.

3. Whether the representation election conducted by the Board was proper and valid where the election was held as officially scheduled by the Board but prior to petitioner's receipt of formal notice from the Board denying petitioner's intervening request to reconsider and set aside the order directing the election.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A of the petition.

STATEMENT

I. The Board's findings of fact

The Board's order here rests upon its finding that petitioner, in violation of Section 8(a)(1) and (5) of the Act, refused to bargain with the union duly certified

by the Board as the representative of employees of petitioner in a single two-plant unit found by the Board to be appropriate. The subsidiary facts on which the order rests are, in relevant part, as follows:

On March 28, 1956, United Industrial Workers Local 976, UAW, AFL-CIO ("the Union"), filed a petition with the Board requesting certification as the bargaining representative for a single unit comprising all of petitioner's production and maintenance employees. These employees worked in two plants in the Los Angeles, California area approximately 2½ miles apart, known as the Avalon Boulevard and Regent Street plants (R. 162-163). Petitioner contended that the employees of each plant should constitute separate bargaining units (R. 163-164). After hearings on the unit issue, the Board held on July 9 that "because of the centralized administration and functional integration of the two plants, the similar skills of the employees, and the uniform personnel policy," a single unit of the production and maintenance employees of both plants was appropriate (R. 34-35, 339). It accordingly directed that an election be held in the two-plant unit within 30 days (R. 338-341).

The election was scheduled for August 8. On July 24, petitioner filed a motion with the Board asking the Board (1) to rehear and reconsider its decision; (2) to suspend the election pending such redetermination; (3) to permit petitioner to adduce additional evidence; (4) to vacate the decision and direction of election; and (5) to dismiss the representation petition (R. 35-36; 424-446). Petitioner contended that the Board's unit determination was inconsistent with

Board determinations in other cases; that certain testimony bearing on the unit issued had not been fully developed at the hearing because petitioner's representatives assumed that the Board would adhere to its past policies and find separate plant units to be appropriate; and that more detailed testimony would reveal pertinent differences in production and working conditions at the two plants.

On August 2, the Board issued a telegraphic order denying petitioner's motion "for the reason that it presents no issues which were not previously considered by the Board" (R. 36; 352-353). Although copies of this order were sent to all parties, petitioner failed to receive its copy until August 10. That copy recited "Delay due to GSA error not National Labor Relations Board" (R. 36; 251-252, 449-451).[2] However, petitioner admittedly received notice on more than one occasion between August 2 and August 8 that the election would be held on the appointed day; and petitioner's secretary-treasurer, Holzman, conceded that he also "may have" been specifically advised that petitioner's motion had been denied (R. 36-37; 326, 329-330, 357).

The election was held on August 8 as scheduled. Ballots were cast by 230 of the approximately 460 employees at both plants who were eligible to vote. Of the 230 votes cast, 207 were for the Union, 1 was for an intervening union, 20 were against either union and 2 ballots were challenged (R. 37; 350-351). None of the parties at any time filed objections to the con-

[2] The reference to "GSA" meant the General Services Administration and its teletype system (R. 36).

duct of the election as permitted by the Board's rules. On August 20, the Board certified United Industrial Workers Local 976, UAW, AFL-CIO, as bargaining representative in the unit found appropriate by the Board (R. 38; 207, 248, 342-343). The certification was later amended without objection by changing the name of the certified union to United Industrial Workers Local 976, International Union, Allied Industrial Workers of America, AFL-CIO (R. 33; 343-344).

Petitioner refused to bargain with the Union as the representative of the employees in the two-plant unit. It took the position that it wanted to test the Board's certification in the courts (R. 42; 43; 214, 219, 353-355); and that insofar as the Avalon plant was concerned, it would not recognize the Union as the representative of the employees at that plant without another election to determine their wishes (R. 42; 214-215, 221-222, 255, 290-291, 295).

In view of petitioner's denial of the Union's representative status at the Avalon plant, the Union proposed late in October that a card check be conducted among the Avalon employees. Petitioner rejected this suggestion (R. 44-45; 279, 295-296), and offered the counter-proposal that a private election be held at the Avalon plant. It notified the Union that it would adhere to its refusal to bargain at Avalon "unless and until a free election by secret ballot is held to determine the wishes of the majority" at the plant. The Union yielded after much protest, but never agreed that the Board's certification was to be affected thereby (R. 46-47, 48; 258-259, 264-265, 281-282, 297-299, 359, 364-365, 366-368, 370-371).

The agreement for the private election provided that if the Union won, the Company would bargain without further objection to the Board's unit finding; but that if the Union lost, the Union would refrain from any strikes or related pressure and petitioner would refrain from any anti-union activity, "until the question of representation is tested and determined by the circuit court of appeals" (R. 52-53; 236-237, 301, 365-367, 375-377). The private election at Avalon was held on November 16 and resulted in a vote of 169 to 137 against the Union. In addition, 49 employees who had been challenged were excluded from the ballot by mutual agreement (R. 53-54; 246-247).

The parties met again on December 4, and the Union renewed its request for bargaining for the two-plant unit. Petitioner refused to discuss any contract covering the Avalon employees and it was agreed that further negotiation was futile (R. 54; 224-225, 227-229, 264-266, 287, 299-301). Charges were then filed by the Union initiating the instant unfair labor practice proceedings before the Board.

II. The Board's conclusions and order

Upon the foregoing findings the Board, affirming the Trial Examiner, concluded that petitioner had refused to bargain with the Union in violation of Section 8(a) (5) and (1) of the Act (R. 81, 74, 76). It refused to permit petitioner to relitigate in the unfair labor practice proceeding the appropriate unit question previously determined in the representation proceeding (R. 56-57, 59); rejected petitioner's contention that the

August election was invalid (R. 59-64); held the November election to be without effect "as it was a private election conducted in only one of two plants which the Board had previously found constituted a single appropriate unit and in which the Union was certified" (R. 81, 64-67); and rejected petitioner's argument that it had bargained in good faith (R. 68-74).

The Board ordered petitioner to cease and desist from continuing its unfair labor practices and directed it to bargain with the Union in accordance with the Board's certification and to post appropriate notices (R. 81-85).

Following the Board's decision and order, petitioner filed a motion for rehearing and reconsideration. It alleged, in addition to matters already presented to the Board, that petitioner was faced with conflicting claims by persons purporting to represent the Union; and suggested that the Union certified by the Board might no longer be in existence. Petitioner, however, did not indicate any willingness to bargain with the certified union or its accredited representatives (R. 86-101). The Union filed an opposition to petitioner's motion (R. 101-103). The Board denied the motion "on the ground that insufficient cause has been shown to warrant changing" its prior decisions and orders (R. 103-104).

III. The decision of the Court of Appeals

The court below unanimously affirmed the Board's findings and conclusions, and enforced the order.

ARGUMENT

1. Petitioner's contention (Pet. 22-30) that the Board committed prejudicial error in the unfair labor practice proceedings by refusing to hear "significant and relevant evidence" is without merit and presents no question warranting review by this Court.

Petitioner argues (Pet. 22-27) that the Board erred when, following its decision and order directing petitioner to bargain with the certified Union, it denied petitioner's motion to set aside the order and to adduce evidence that the Union had ceased to exist and that petitioner was faced with conflicting claims by persons purporting to represent the Union. The Board properly denied this motion. Throughout these proceedings, petitioner's position has been that the Board's certification of the Union on the basis of a single unit covering both plants was invalid, and it refused to bargain with the Union solely for that reason. At no time in the discussions with the Union did it question the latter's existence or the identity of the Union representatives. Indeed, even when petitioner sought reconsideration of the Board's unfair labor practice order, it did not indicate any willingness to bargain with the certified union.

In these circumstances, we submit that the Board properly refused to reopen the proceedings. The evidence which petitioner sought to adduce might have been relevant in determining whether, if it had accepted the order, subsequent non-compliance was justified be-

cause of inability to do so. But where, as here, petitioner challenged the legality of the order itself, there was no occasion for the Board to consider matters which might serve to excuse compliance with a lawful order.[3]

Equally insubstantial is petitioner's further claim (Pet. 27-30) that the Board erred in refusing to permit it to adduce evidence in the unfair labor practice hearing that significant differences existed between the two plants which the Board had found to constitute a single appropriate unit in the antecedent representation proceedings. Petitioner conceded that "as to the alleged differences between the two plants," the situation was the same as "existed at the time of the original Board representation hearing" (R. 318-319). It is settled that in the absence of newly discovered evidence "an issue covered and decided in [representation] proceedings cannot as of right be relitigated in a subsequent unfair labor practice proceeding" (*National Labor*

[3] The cases relied on by petitioner (Pet. 26-27) are clearly distinguishable. In both *Dickey* v. *National Labor Relations Board*, 217 F. 2d 652 (C. A. 6) and *Carpenteria Lemon Association* v. *National Labor Relations Board*, 240 F. 2d 554 (C. A. 9), certiorari denied, 354 U. S. 909, the Board certified a union as the bargaining representative of the employees of the respective employer. Thereafter the union merged with or affiliated with another labor organization, and the respective certifications were amended to reflect the change in names. The employers refused to honor the amended certifications, claiming that by reason of the merger or change of affiliation the original certified union had lost its identity as bargaining representative of the employees. As noted above, petitioner's refusal to honor the Board certification in the instant case has been based not on a claim that the certified union has lost it identity or become defunct, but on the ground that the Union has never been the lawful bargaining representative of its employees in the unit found appropriate by the Board.

Relations Board v. *Worcester Woolen Mills Corp.*, 170 F. 2d 13, 16 (C.A. 1), certiorari denied, 336 U.S. 903). As this Court has stated, "Nothing more appearing, a single trial of the issue was enough." *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 162. Petitioner made no showing to justify departure from this settled rule.

2. Petitioner also asserts (Pet. 30-33) that the election which resulted in the certification of the Union was invalid because it was held before petitioner received formal notice of the Board's order denying petitioner's motion for a reconsideration of the unit determination. The contention is without merit. As stated above, the Board issued its order denying petitioner's motion on August 2, 1956. Because of delay in transmittal, not attributable to the Board, petitioner did not receive a copy of the order until August 10. The election was held as previously scheduled on August 8. However, petitioner admittedly received notice on more than one occasion between August 2 and August 8 that the election would be held on the appointed day. Petitioner also conceded that it "may have" been specifically advised that its motion had been denied. Petitioner filed no objections to the conduct of the election or conduct affecting the results of the election which under the Board's Rules and Regulations it was permitted to do. Moreover, there is no showing that the delay in officially notifying petitioner of the Board's ruling on the motion to reconsider in any way affected the employees' participation in the election. In these circumstances, petitioner's claim that the election was defective is baseless.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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